No. 87-1298

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1987

WALTER J. BEPPLER,

Appellant,

vs.

TOWNSHIP OF WASHINGTON and TOWNSHIP OF WASHINGTON PLANNING BOARD,

Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

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27 pp

QUESTION PRESENTED

Whether Ordinance No. 83-4 of the Township of Washington Bergen County, New Jersey Zoning Ordinances is violative of the Just Compensation Clause of the Fifth Amendment of the Constitution of the United States when applied to deny a landowner from developing a nonconforming property.

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No.

In The

Supreme Court of the United States

October Term, 1987

WALTER J. BEPPLER,

Appellant,

vs.

TOWNSHIP OF WASHINGTON and TOWNSHIP OF WASHINGTON PLANNING BOARD,

Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Walter J. Beppler, the appellant, appeals from the final order of the Supreme Court of New Jersey, dated November 2, 1987 and filed November 5, 1987, denying plaintiff-movant's motion for reconsideration of the court's denial of plaintiff-movant's petition for certification.

OPINIONS BELOW

The decision of the Supreme Court of New Jersey dated November 2, 1987 is not reported. It is reprinted in the appendix hereto, page 2a, *infra*.

The decision of the Supreme Court of New Jersey dated June 26, 1987 is not reported. It is reprinted in the appendix hereto, page 3a, *infra*.

The per curiam decision of Superior Court of New Jersey, Appellate Division, dated October 2, 1986, is not reported. It is reprinted in the appendix hereto, page 4a, *infra*.

The judgment of the Superior Court of New Jersey, Law Division, dated September 18, 1985, is not reported. It is reprinted in the appendix hereto, page 7a, *infra*.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of New Jersey, denying appellant's petition for certification was entered on June 26, 1987. A motion for reconsideration was entertained and denied on November 2, 1987.

This appeal is being docketed in this Court within 90 days from the denial of reconsideration below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Notice of Appeal was filed with the Supreme Court of New Jersey on February 1, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> . . . nor shall private property be taken for public use without just compensation.

N.J.S. 40:55D-60:

> . . . Whenever the proposed development requires approval pursuant to this act of a subdivision, site plan or conditional use, but not a variance pursuant to subsection d. of section 57 of this act (C. 40:55D-70), the planning board shall have the power to grant to the same extent and subject to the same restrictions as the board of adjustment:
>
> a. Variances pursuant to subsection 57 c. of this act;
>
> b. Direction pursuant to section 25 of this act for issuance of a permit for a building or structure in the bed of a mapped street or public drainage way, flood control basin or public area reserved pursuant to section 23 of this act; and
>
> c. Direction pursuant to section 27 of this act for issuance of a permit for a building or structure not related to a street.
>
> Whenever relief is requested pursuant to this section, notice of the hearing on the application for development shall include reference to the request for a variance or direction for issuance of

a permit, as the case may be.

The developer may elect to submit a separate application requesting approval of the variance or direction for the issuance of a permit and a subsequent application for any required approval of a subdivision, site plan or conditional use. The separate approval of the variance or direction for the issuance of a permit shall be conditioned upon grant of all required subsequent approvals by the planning board. No such subsequent approval shall be granted unless the approval can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance.

N.J.S. 40:55D-70:

The board of adjustment shall have the power to:

a. Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance;

b. Hear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance, in accordance with this act;

c. (1) Where: (a) by reason of exceptional

narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of any regulation pursuant to article 8 of this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship; (2) where in an application or appeal relating to a specific piece of property the purposes of this act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from regulations pursuant to article 8 of this act; provided, however, that no variance from those departures enumerated in subsection d. of this section shall be granted under this subsection; and provided further that the proposed development does not require approval by the planning board of a subdivision, site plan or conditional use, in conjunction with which the planning board has power to review a request for a variance pursuant to subsection 47 a. of this act, and

d. In particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to

permit: (1) a use or principal structure in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use, (3) deviation from a specification or standard pursuant to section 54 of P.L. 1975, c. 291 (C. 40:55D-67) pertaining solely to a conditional use, (4) an increase in the permitted floor area ratio as defined in section 3.1 of P.L. 1975, c. 291 (C. 40:55D-4), (5) an increase in the permitted density as defined in section 3.1 of P.L. 1975, c. 291 (C. 40:55D-4), except as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots are either an isolated undersized lot or lots resulting from a minor subdivision. A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board, or two-thirds of the full authorized membership, in the case of a regional board, pursuant to article 10 of this act.

No variance or other relief may be granted under the terms of this section unless such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. In respect to any airport hazard areas delineated under the "Air Safety and Hazardous Zoning Act of 1983," P.L. 1983, c. 260 (C. 6:1-80 et seq.), no variance or other relief may be granted under the terms of this section, permitting the creation or establishment of a nonconforming use which would be prohibited under the standards promulgated pursuant to that act, except upon issuance of a permit by the

Commissioner of Transportation. An application under this section may be referred to any appropriate person or agency, for its report; provided that such reference shall not extend the period of time within which the zoning board of adjustment shall act.

HOW THE FEDERAL QUESTION WAS RAISED

At the trial stage below the appellant raised the claim that the Township Planning Board's denial of his application for a conditional use resulted in an unconstitutional taking of property.

This unconstitutional taking of property or Fifth Amendment claim was reiterated by appellant before the Appellate Division. The Supreme Court of New Jersey denied appellant's petition for certification and motion for reconsideration. It thus implicitly considered and rejected this federal constitutional claim.

STATEMENT OF THE CASE

The appellant, Walter J. Bepper, is the owner of an undeveloped lot known as Lot 5-H, Block 4102 A on the Tax Assessment Map of the Township of Washington, Bergen County, New Jersey. The lot area is approximately 3,600 square feet with a frontage of 52.94 feet. The lot has a depth of 95.03 feet and is 23.27 feet wide in the rear. The subject property has an irregular shape. The lot was created in 1947 as part of a subdivision of additional property owned by appellant. The subdivision map was approved by the following authorities on the dates listed below:

1. Washington Township Zoning Board of Adjustment - April 24, 1947

2. Washington Town Planning Board - May 12, 1947

3. Township Committee of Washington Township - May 13, 1947

4. Bergen County, New Jersey Planning Board - June 11, 1947

Appellant acquired the subject property which was included as part of a large parcel in July, 1946. It was subdivided by the Washington Township Engineer, Frank J. Henninger, into eleven lots in October, 1946. According to the subdivision map, the lot was excepted from the zoning ordinance in effect at that time. The Township Engineer assured appellant that all of the lots in the subdivision, including the lot in question, were buildable despite the fact that the subject lot was in a Class A District at the time of the subdivision. The Township of Washington Zoning Ordinance No. 100 was adopted in September, 1941. The ordinance provides that no lot within a Class A district "shall have a street frontage of less than one hundred (100) feet in width and an area of not less than ten thousand (10,000) square feet." Given the dimensions of the undersized lot, appellant and the Township Engineer sought an exception from the zoning code to allow the future development of this lot. In accordance with the subdivision map, the exception was approved by the appropriate authorities.

Since 1965, appellant has sought to develop the lot in question. Appellant filed a complaint dated November 23, 1982, Docket No. L-017676-82 in Superior Court of New Jersey, Bergen County, Law Division, in response to a resolution adopted by the Washington Township Board of Adjustment on July 22, 1982 which denied an application that had been made by appellant to permit the construction of a one-family dwelling on the subject lot. While the litigation was pending, Washington Township enacted Ordinance No. 83-4 concerning the conditional use of nonconforming lots. Because this was an inverse condemnation action, the matter was remanded to the Washington Township Planning Board. On February 6, 1985, a resolution was adopted by the Washington Township Planning Board which denied appellant's application for the conditional use of the undersized lot.

The Township of Washington Planning Board made the

following findings of fact and conclusions in its resolution:

> 1. The applicant was the owner of the premises in question at the time of the adoption of the first zoning ordinance in Washington Township pertaining to said premises.
>
> 2. The applicant was also the adjoining owner of adjoining lots to the premises at the time of the first adoption of the zoning ordinance pertaining to the premises by the Township of Washington.
>
> 3. At the time of the adoption of the earliest land use restriction rendering the lot not conforming, the applicant was the legal owner of contiguous land.
>
> 4. The applicant by his own subdivision created the premises in question and created the nonconforming condition of the premises in question.

In accordance with a Deed dated July 17, 1946 conveying the as yet unsubdivided property to appellant, it is evident that the Planning Board's findings of fact and conclusions in paragraph numbers one, two, and three are wrong. Appellant purchased the premises in July, 1946 and did not own them at the time of the adoption of the first zoning ordinance in Washington Township in September, 1941 pertaining to the premises. Nor did appellant own adjacent lots to the subject premises at the time of the first adoption of the zoning ordinance in 1941. Nor did appellant own contiguous land at the time (in 1941) of the adoption of the earliest land use restriction rendering the lot nonconforming.

Appellant complied with Ordinance No. 83-4 and, specifically, the Requirements for Development under S74-81.

Appellant communicated good faith offers to the contiguous property owners, Messrs. Osborne and Radin and the Township of Washington to sell his property to them, but none of the adjacent landowners expressed an interest in buying. Appellant made an offer to buy a 714 square foot parcel of land for $2,000 from Mr. Osborne, but acquisition of such a parcel would have rendered appellant's lot nonconforming.

Appellant filed a complaint in Superior Court of New Jersey, Law Division, Bergen County, seeking inverse condemnation or in the alternative a variance. After a trial, the court entered judgment in favor of the appellees and against appellant and dismissed appellant's complaint.

A per curiam judgment was filed by the Superior Court, Appellate Division, which upheld the denial of appellant's application for a conditional use permit to construct a single family house on an undersized lot because the court found that appellant created the nonconforming condition or self-inflicted hardship. Certification was denied by the Supreme Court of New Jersey.

THE QUESTION IS SUBSTANTIAL

The Fifth Amendment implications of taking property without just compensation have been recognized by this Court in *First Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 107 S. Ct. 2378 (1987).

This Court has recognized that the property owner is burdened by a governmental action that amounts to a taking and is entitled to compensation under the Just Compensation Clause of the Fifth Amendment.

Pursuant to N.J.S. 40:55D-60, municipal planning boards are empowered to grant a conditional use variance in conformity with N.J.S. 40:55D-7(c) whereby reason of extraordinary and exceptional situation or condition of a specific piece of property, that such property is incapable of development under the Municipal Land Use Law, N.J.S. 40:55D-1 *et seq.* and such limitation would result in exceptional and undue hardship upon the developer of the property. The conditional use may be granted where there is no substantial detriment to the public good and where the intent and purpose of the zone plan and zoning ordinance is not substantially impaired.

Appellant proposed to erect a one-family residence conforming with the use requirement of the Washington Township Zoning Ordinance. However, there is insufficient frontage and area according to the ordinance.

Appellant's inability to develop this undersized lot results in undue hardship to him under the statute. Although an "owner is not entitled to have his property zoned for its most profitable use," *Bow & Arrow Manor v. West Orange,* 63 N.J. 335, 350 (1973), where an ordinance renders a property unusable for any purpose it must be concluded that the property owner suffers an undue hardship. *Commons v. Westwood Zoning Board of Adjustment,* 81 N.J. 597, 606 (1980).

It is undeniable that a nonconforming lot was created by the 1947 subdivision. Although the Planning Board has stated that appellant's hardship was self-inflicted, it is important to bear in mind that the lot was excepted from compliance with the zoning ordinance.

Convinced that he was granted an exception, appellant nevertheless made a good faith effort to comply with the conditional use ordinance. For example, appellant made good faith

offers to sell his property to or purchase property from the adjoining property owners, including the Township of Washington at a fair and reasonable price. As the Supreme Court of New Jersey observed in *Chirichello v. Zoning Board of Adj. Monmouth Beach,* 78 N.J. 544, 561 (1979), "an impingement of the zoning restriction may be of varying degrees. The less of an impact, the more likely the restriction is not that vital to valid public interests." Similarly, in the instant case, an insubstantial change is sought. The area is already zoned residential. This is the only undeveloped property in the neighborhood. A one-family dwelling residence with garage is proposed. It would not contribute to a crowding condition in the existing residential zone, nor would it impair the quality of the residential area or diminish the value of existing houses in the area. The residence would comply with such specifications as area coverage, maximum height, setback and side yard requirements. Where the spirit of the ordinance and the general welfare are observed, the conditional use may be granted. *See Chirichello, supra* at 552.

Here, denial of a conditional use has resulted in zoning the property into inutility. The property has been rendered useless for practical purposes. It sits as a vacant lot. In such a case, an exercise of eminent domain is necessary, along with payment of compensation to plaintiff-appellant if he is not allowed to develop the property. *Harrington Glen, Inc. v. Leonia Board of Adjustment,* 52 N.J. 22, 33 (1968). In *Harrington Glen,* 52 N.J. at 32, the Supreme Court said that "a municipality cannot constitutionally restrict the use of an owner's land in such manner as to deprive him of all practical use of it." Such deprivation amounts to confiscation for which an obligation to compensate the owner for the loss suffered must be accepted. *AMG Associates v. Twp. of Springfield,* 65 N.J. 101 (1974).

This Court has emphasized the constitutional dimensions of the issue of deprivation of all use of a property in two recent

decisions that were decided in favor of the landowners: *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 107 S. Ct. 2378 (1987); *Nolan v. California Coastal Commission,* 107 S. Ct. 3141 (1987).

In *First English,* the Court recognized that the Fifth Amendment is designed "to secure compensation in the event of otherwise proper interference amounting to a taking." 107 S. Ct. at 2386. The local ordinance amounted to a taking of appellant's property and the Fifth Amendment requires that the township pay the landowner for the value of the property because the taking in the instant case is at the least temporary and may be permanent.

As in *Nolan,* no conditions exist herein to abridge property rights through the police power as a substantial advancement of a legitimate state interest.

Why should appellant not be protected in his Fifth Amendment right to receive just compensation for his property?

The township has imposed its ordinance in such a way as to take appellant's property without just compensation. The absence of just compensation or the granting of a variance adds substantially to the Fifth Amendment claim.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

BRUCE J. STAVITSKY
Attorney for Appellant

APPENDIX A — NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE
STATE OF NEW JERSEY
No. 26,589

WALTER J. BEPPLER,

Appellant,

vs.

TOWNSHIP OF WASHINGTON AND TOWNSHIP OF WASHINGTON PLANNING BOARD,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Walter J. Beppler, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey denying motion for reconsideration entered in this action on November 2, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

s/ BRUCE J. STAVITSKY, ESQ.
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APPENDIX B —ORDER DENYING MOTION OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
M-181 September Term, 1987

26,589

WALTER J. BEPPLER,

Plaintiff-Movant,

vs.

TOWNSHIP OF WASHINGTON, et al.,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 2nd day of November, 1987.

s/ Stephen W. Townsend
CLERK OF SUPREME COURT

(Filed November 5, 1987)

APPENDIX C — ORDER DENYING PETITION FOR CERTIFICATION OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
M-181 September Term, 1987

26,589

WALTER J. BEPPLER,

Plaintiff-Appellant,

vs.

TOWNSHIP OF WASHINGTON, et al.,

Defendants-Respondents.

A petition for certification of the judgment in the Appellate Division, Docket No. A-809-85-T1 having been submited to this Court, and the Court having considered the same; it is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 26th day of June, 1987.

s/ Stephen W. Townsend
CLERK OF SUPREME COURT

APPENDIX D — DECISION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED OCTOBER 2, 1986

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-809-85-T1

WALTER J. BEPPLER,

Plaintiff-Appellant,

vs.

TOWNSHIP OF WASHINGTON and TOWNSHIP OF WASHINGTON PLANNING BOARD,

Defendants-Respondents.

Argued September 23, 1986 —
Decided October 2, 1986.

Before Judges Michels, O'Brien and Skillman.

On appeal from Superior Court of New Jersey, Law Division, Bergen County.

Bruce J. Stavitsky argued the cause for appellant.

Kenneth G. Poller argued the cause for respondent (Wurtzel & Poller, attorneys; Mr. Poller, on the brief).

Appendix D

PER CURIAM

Plaintiff applied to the defendant, Washington Township Planning Board, for a conditional use permit to construct a single family house on an undersized lot. The Planning Board denied the application, finding among other things that "[t]he applicant by his own subdivision created the premises in question and created the nonconforming condition of the premises." Plaintiff challenged this denial by an action in lieu of prerogative writ.

In a comprehensive oral opinion Judge Smith, sitting in the Law Division, sustained the action of the Planning Board and dismissed the complaint. Judge Smith found that when plaintiff secured approval in 1947 for the subdivision of a tract he owned into 17 lots, the lot in question was nonconforming because it "was grossly undersized even at that time." Furthermore, there was no evidence plaintiff had obtained a variance for this lot. Consequently, Judge Smith concluded that the Planning Board had correctly determined that plaintiff did not qualify for the issuance of a conditional use permit.

We affirm substantially for the reasons expressed in Judge Smith's opinion. We further note that Washington's zoning ordinance prohibits the issuance of conditional use permit where "the owner of the lot . . . created the nonconforming condition of the lot or caused self-inflicted hardship on the lot." Therefore, the ordinance under which plaintiff filed his application specifically prohibits the grant of a conditional use permit under the facts as found by the Planning Board and Judge Smith.

Appendix D

Affirmed.

A TRUE COPY

s/ Elizabeth McLaughlin

APPENDIX E — JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. L-23174-85

CIVIL ACTION

WALTER J. BEPPLER

Plaintiff,

vs.

THE TOWNSHIP OF WASHINGTON,

Defendant.

JUDGMENT

THIS MATTER having come on for trial before the Honorable Harvey Smith on September 5, 1985, Bruce J. Stavitsky, Esq., appearing on behalf of the plaintiff, Walter J. Beppler, and Kenneth G. Poller, Esq., Wurtzel & Poller, Esqs., appearing on behalf of the defendants, and the Court having conducted its prescribed hearing, and having heard, reviewed and considered the arguments of counsel, the record below, and the

Appendix E

exhibits marked into evidence, and the Court having delivered its oral opinion on September 5, 1985, at the conclusion of said hearing, and for good cause shown:

IT IS on the 18th day of September, 1985,

ORDERED that Judgment be and is hereby entered in favor of the defendants and against the plaintiff; and it is further

ORDERED that the plaintiff's complaint be and is hereby dismissed with prejudice and without costs.

s/ Harvey Smith
HARVEY SMITH, J.S.C.

(Filed September 18, 1985)

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MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87 1298

In The

Supreme Court of the United States

October Term, 1987

WALTER J. BEPPLER,

Appellant,

vs.

TOWNSHIP OF WASHINGTON and
TOWNSHIP OF WASHINGTON PLANNING BOARD,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS IN RESPONSE TO THE JURISDICTIONAL STATEMENT

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Verona, Inc. v. Mayor and Council of West Caldwell, 49 N.J. 274, 282-283, 229 A 2d 651 (1967) 9

the Township of Washington since the zoning ordinance predated the Appellant's subdividing of his large tract of land into smaller lots for development purposes. The "taking" was by the Appellant himself since he chose to create a lot which was not a permissibly developable property in the applicable zone. The salient facts underlying the issues presented in the case at bar follows.

Walter Beppler, Appellant in this action, purchased the subject property, Lot 5H, Block 4102A, as part of a larger tract in July 1946. Lot 5H bears a frontage of 52.94 feet. The rear boundary of the property is only 23.27 feet in length. The sides are 95.03 feet and 93.59 feet respectively.

Bulk requirements had been established in the Township of Washington, State of New Jersey in 1941 by ordinance. The property in question was situated in a Class A Zone, where both the frontage and width requirements were 100 feet. The ordinance was and remained in force when Appellant both purchased and subdivided his property.

In 1947 the Appellant submitted for the Planning Board's approval a subdivision map reflecting several lots with the required 100 feet frontage. It included a newly created lot with a frontage of 85.15 feet, an undersized lot under the 1941 zoning ordinance. Another newly created lot having frontage of 52.94 feet was also reflected on the map. This lot, designated lot 5H on the subdivision map, is the subject of the case at bar.

On the subdivision map, the word "excepted" appears on the subject parcel. All of the other lots appearing on the subdivision map which were not part of the subdivision development submitted by the Appellant to the Township of Washington

MOTION TO DISMISS

Appellee Township of Washington and Township of Washington Planning Board (sometimes collectively referred to as "Township of Washington") files the within Motion to Dismiss in response to the Jurisdictional Statement filed by Appellant Walter J. Beppler.

STATEMENT OF THE CASE

The case sub judice presents a factual situation in which a landowner subdivided a large tract of land into as many lots as was permitted under the applicable municipal zoning ordinance governing the size and frontage of lots in the subject zone. This action resulted in the creation of two undersized lots. The landowner applied for, and received, a variance for one of the lots from the municipal zoning board of adjustment, but never applied for a variance for the other undersized lot. In such posture, the municipal planning board approved the landowner's subdivision which expressly reflected the undersized lot herein under consideration as being excepted from the planning board's subdivision approval. Thus, the subject lot remained undevelopable as a direct result of the actions of the landowner in effecting a self-created hardship. The refusal of the Township of Washington to permit development on this self-created undersized lot brings to bear the application of established principles of law concerning undersized lots in a municipal zoning context.

Appellant, in his Jurisdicational Statement, seeks to invoke this Court's jurisdiction with respect to the case at bar utilizing the provision of the Fifth Amendment of the U.S. Constitution which prohibits the governmental taking of private property without just compensation. However, there was no governmental taking by

Planning Board in 1947 bore the same notation. Thus, the Planning Board did not consider or pass upon any of these lots so noted, including the lot in question.

Conversely, the Planning Board did consider the undersized lot bearing frontage of 85.15 feet. However, the Planning Board did not have authority in 1947 to grant a variance to that undersized lot for development; rather, such authority rested exclusively within the province of a different municipal agency; namely, the Township of Washington Board of Adjustment.

Recognizing that the Planning Board had no authority to grant a variance for the development of an undersized lot, the Appellant requested the Board of Adjustment to grant a variance for the lot having frontage of the 85.15 feet. The application was made by letter dated April 13, 1947. At the January 1985 hearing before the current Planning Board, the letter application was marked as an exhibit. The letter indicated that the Planning Board in 1947 initially rejected the subdivision because the 85.15 lot did not have the required frontage for the zone. The subdivision map reflects that the Board of Adjustment granted approval for development of the 85.15 lot at its regular meeting held on April 24, 1947. Thereafter, the Planning Board approved the subdivision at its meeting of May 12, 1947.

At no time was approval given for the development of the lot having frontage of 52.94 feet (lot 5H), the lot which is the subject of the present appeal. It continued to bear the notation "excepted." It was never the subject of an application before the Board of Adjustment for a variance. The Planning Board never approved development of lot 5H, nor did it have the legal authority to do so.

Prior to the appellant's application before the current Planning Board, the Appellant had applied to the Zoning Board of Adjustment for a variance in 1982 for the lot with the 52.94 foot frontage, lot 5H. The denial of the variance was primarily based upon the doctrine of self-created hardship. Thereafter, Appellant filed suit in the Superior Court of New Jersey, Law Division, based upon the Zoning Board's denial.

During the pendency of that suit, Washington Township enacted an ordinance which addressed the development of undersized lots as a conditional use authorized by N.J.S. 40:55D-67. The ordinance provides a bifurcated procedure with reference to any application for development as a conditional use. The first phase involves an inquiry by the Planning Board as to whether or not the subject lot is eligible for development. The basic criteria for eligibility mirror the current state of the law in the State of New Jersey regarding permissible developments of undersized lots. The ordinance retained the long established and well recognized "self-created hardship" doctrine which appears in the case law of the State of New Jersey.

The ordinance provides that no lot shall be eligible for development under the ordinance unless all of the requirements set forth in the ordinance are satisfied. They include the following:

> The lot was in existence as a separate lot at the time of enactment of the earliest land use restriction which rendered the lot non-conforming.
>
> At the time of adoption of the earliest land use restriction rendering the lot nonconforming, and at all times subsequent

thereto, no legal or equitable owner of the lot has simultaneously held legal or equitable title to any contiguous land.

Neither the owner of the lot nor any of said owner's predecessors in title created the non-conforming condition of the lot or caused self-inflicted hardship on the lot however evidenced.

The current Planning Board determined that the Appellant was the owner of adjoining lots to the subject lot at the time of the first adoption of the zoning ordinance pertaining to the subject premises; that at the time of the adoption of the earliest land use restriction rendering the lot non-conforming, the Appellant was the legal owner of contiguous land; and that the Appellant by his own subdivision created the subject lot and created the non-conforming condition of said lot. Thus, the Planning Board determined that the subject lot was not an eligible lot for development under the ordinance.

Thereafter, Appellant appealed to the Superior Court, Law Division, which upheld the decision of the municipal planning board, entered judgment in defendants' favor. The Superior Court, Appellate Division, affirmed the Superior Court, Law Division's determination per curiam.

The Appellant filed a Notice of Motion before the New Jersey Supreme Court for leave to file a Petition for Certification out of time. Thereafter, the Appellant filed a Petition for Certification which was denied by the New Jersey Supreme Court.

DISCUSSIONS AS TO APPLICABLE LAW

Appellant claims that the action of the municipal planning board, which has been affirmed by each State Court reviewing such action, violates the Fifth Amendment of the U.S. Constitution by such action constituting a taking of appellant's property without just compensation. However, Appellant created his own dilema by seeking to maximize his profit in 1947 through his subdivision of a large tract of land into the most number of lots permitted by the municipal zoning ordinance then in effect. He did not have to subdivide this tract into as many individual lots as he chose. Rather, he could have made the subject lot part of a conforming lot, thus creating a slightly larger lot than was the minimum required in the applicable zone. Because he chose not to do this, he created, in effect, an unusable undersized lot. He now innocently claims that he has been deprived of the use of this undersized lot without having received just compensation under the guise of the Fifth Amendment. However, the actions of Appellant himself bar him from now claiming any violation of the provisions of the Fifth Amendment.

AS TO REFUSAL BY THE TOWNSHIP OF WASHINGTON TO PERMIT DEVELOPMENT OF THE SELF-CREATED UNDERSIZED LOT

The decisions of the State Courts below do not violate the provisions of the Fifth Amendment, and were based upon the existing case law of the State of New Jersey as outlined below.

Absent conduct which is wholly arbitrary and capricious, a court should not ordinarily disturb a planning board's determination. Kessler v. Bowker, 174 N.J. Super. 478, 480, 417 A 2d 34 (App. Div. 1979), certif. denied, 85 N.J. 99, 425 A 2d 264 (1980). The burden of establishing arbitrary conduct lies with the complaining party

(the Appellant herein). The Appellant failed to sustain his burden before the State Court, since the Planning Board's decision was fully supported by the record, and this determination was joined in by the Appellate Division in its decision, which was left undisturbed by the action of the New Jersey Supreme Court.

Washington Township's conditional use ordinance required the Board to consider: the existence of the lot as a separate entity prior to enactment of the ordinance; the inability to develop the land solely as a result of municipal land use restrictions; the existence of the lot as a separate entity at the time of enactment of the earliest land use restriction rendering the lot non-conforming; the ownership of contiguous land; and the existence of any self-inflicted hardship. These criteria reflect the state of law governing the development of undersized lots in the State of New Jersey. See, Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 605-8, 410 A 2d 1138 (1980).

At the hearing of January 2, 1985, the Planning Board had before it the subdivision map of 1946 and the letter from Walter J. Beppler dated April 13, 1947. The documentary evidence was supplemented by the testimony of Appellant. Mr. Beppler testified that he subdivided the tract thereby creating the non-conforming lot. Considerable time was devoted to the reasonable interpretation of the term "excepted." At the hearing, counsel for the Board specifically asked Mr. Beppler if the application in 1947 was limited to construction on the full sized lots and one lot bearing frontage of 85.15 feet, to the exclusion of lot 5H, the subject of this suit. Mr. Beppler replied that the application did not concern "the other lot", i.e., lot 5H.

The Trial Court properly concluded that the crucial issue pertained to the interpretation of the

subdivision map. Counsel for Mr. Beppler does not dispute this fact. A review of the subdivision map reflects that the word "excepted" appears on all lots which were not part of the subdivision development. Opposing counsel's argument before both the Trial Court and the Planning Board that the word "excepted" meant that a variance had been granted for that lot is totally unfounded in fact and in logic.

First, there was no record that variances were granted to all lots bearing the notation "excepted." The Appellant had come forth with no resolution or other document supporting that position.

Second, since the subject zone required 100 feet frontage for a lot to be developed there is no rationale for the word "excepted" to be noted on the several conforming lots adjacent to the subdivision brought before the Planning Board for consideration in 1947. For example, lots 4, 3, 5B, 2 and 5A all have the required frontage for the zone. Nevertheless, they bear the notation "excepted" on the subdivision map.

Third, appellant's counsel argued that lot 5H was the subject of a variance because the word "excepted" appeared thereon on the subdivision map. However, the court observed that lot 4B (the 85.15 foot frontage lot) which did, in fact, have a variance, did not have any such notation.

Fourth, since the application in 1947 was brought before the Planning Board by the Appellant, there is no rational explanation for variances to have been granted to lots not owned by the Appellant. For example, reference is made to lot 3 which was owned by one Otto Shultz, and lot 4 which was owned by one F. Leyer. The Trial Court made specific mention of this fact.

Finally, the Trial Court properly found that, in 1947, the Planning Board did not have the legal authority to grant such variances. Rather, that power rested solely with the Board of Adjustment. See, Loechner v. Campoli, 49 N.J. 504, 512, 231 A 2d 553 (1967), and the subsequent change in the Municipal Land Use Law. Appellant's letter dated April 13, 1947 to the Board of Adjustment specifically supports this position. The letter noted that the Planning Board had rejected the subdivision because "one lot did not have the required 100 foot frontage." The specific lot referred to in that letter, lot 4B, had "frontage of eighty five and fifteen one hundreds feet." The plaintiff requested action by the Board of Adjustment at its April 24th meeting. Action was taken by the Board of Adjustment with respect to the 85.15 foot frontage lot, the "short lot", as evidenced by its approval noted on the subdivision map. However, there was no application with respect to the 52.94 foot frontage lot, lot 5H, the lot herein under consideration.

Appellant argued, in effect, that the word "excepted" appearing on the 1947 subdivision map was the equivalent of a special use exception under the forerunner to the New Jersey Municipal Land Use Law. However, such a position is untenable.

Special exceptions (or special uses) under New Jersey's former municipal land use law represented affirmative decisions by the legislative body of a municipality that a particular use was desirable for the benefit of the municipality, and would be permitted in zones otherwise excluding such use, provided the location of the use met certain standards or requirements. See Tullo v. Millburn Township, 54 N.J. Super. 483, 49-491, 149 A 2d 620 (App. Div. 1959); Verona, Inc. v. Mayor and Council of West Caldwell, 49 N.J. 274, 282-283, 229 A 2d 651 (1967). A special exception could never be

implemented by a mere notation on a subdivision map. Rather, it would have had to be the result of a legislative enactment, i.e., an ordinance.

In the case sub judice, the Trial Court properly concluded the Planning Board's determination that the subject lot (lot 5H) did not meet the eligibility requirements for development under the municipality's ordinance was amply supported by the record below. Washington Township's 1941 zoning ordinance imposed a 100 foot frontage requirement on lots located in the subject zone. The Appellant purchased a tract of land which included the presently identified lot 5H subsequent thereto. Thereafter, the Appellant, being fully chargeable with knowledge of the pre-existing zoning requirements, elected to subdivide the tract of land which resulted in the creation of lot 5H as an undersized lot. Such action by the Appellant is a classic example of a self-created hardship.

The Trial Court observed that the law regarding non-conforming lots was fixed in Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 410 A 2d 1138 (1980). The standards articulated in that case are reflected in Washington Township's ordinance. That ordinance served as the basis for appellant's application to the Planning Board in January of 1985. In all such cases the first issue concerns the nature of the hardship, i.e., whether it was self-created. The Trial Court correctly concluded that the question of self-created hardship was the pivotal issue in the present case.

Reference is made to George F. Barnes Land Corporation v. Wyckoff Township Board of Adjustment, 174 N.J. Super. 301, 416 A 2d 431 (App. Div. 1980) which was specifically noted by the Trial Court. There the plaintiff also sought a variance from the municipal bulk requirements. Subsequent to the enactment of the ordinance

regulating minimum lot size, the larger tract was subdivided into two smaller non-conforming parcels. Id. at 303-04. Relief was denied since plaintiff's predecessor in title had created the non-conformity. Id. at 304.

In the present case it was the Appellant himself, not any predecessor in title, who created the hardship. The appearance of lot 5H on the subdivision map does not render the parcel exempt from the application of the zoning requirements, particularly where the adjacent lots were in common ownership.

The Planning Board's determination was amply supported by the record before it. Field v. Franklin Township, 190 N.J. Super. 326, 330, 463 A 2d 391 (App. Div. 1983). Consequently, there was no basis for the court to interfere with the board's decision.

AS TO REFUSAL BY THE TOWNSHIP OF WASHINGTON AND THE STATE COURT TO PERMIT INVERSE CONDEMNATION

Inverse condemnation is available where the value of property has been diminished by an excessive exercise of municipal zoning authority. Since the hardship in the present case was not the result of municipal action but was self-inflicted, there exists no basis to order the municipality to compensate Appellant for the "taking" of his property. Barnes, supra at 304.

Mere inutility is insufficient to establish a cause of action for inverse condemnation. Instead the owner's inability to use his property must be directly attributable to the unreasonable or excessive exercise of governmental authority. The facts in this case belie such a conclusion. The Planning Board concluded that Appellant did not come within the ambit of the undersized lot conditional use ordinance, because the

nonconformity was not caused by the municipality. Indeed, Appellant created his own hardship when he subdivided the tract in 1947, thereby creating the leftover parcel, lot 5H. Consequently, the Trial Court correctly interpreted the 1947 subdivision map in the same manner as the Planning Board had.

In support of his conclusion, the Trial Court noted the following facts. The lot was "grossly undersized." Situated in Class A zone, requiring frontage of 100 feet and a total area of 10,000 square feet, lot 5H bears frontage of 50 feet. At the rear, the property is only 23.27 feet wide. Contrary to opposing counsel's conclusion, construction of a dwelling upon the subject lot would both impair the intent of the zoning ordinance and diminish the quality of the residential area.

As noted previously, an examination of the subdivision map in light of the surrounding facts and circumstances, compels the conclusion that no variance was granted for lot 5H by means of the word "excepted." At the time of the subdivision in 1947, Mr. Beppler owned lot 5H as well as adjoining property. As the Trial Court noted, Appellant could have added the additional 50 feet to the adjoining lot, lot 5G, and perhaps he could have commanded a greater purchase price.

According to the Trial Court, the simple fact is that Mr. Beppler "got as many lots out of it as he could, and he had a piece left over that he decided to keep for himself. That's the only interpretation that can be given." It bears emphasis that Appellant made no effort to build upon lot 5H, the subject of this appeal, until approximately 20 years later. The record amply supports the fact that the hardship was self-created. Since the inutility of Appellant's property is directly attributable to his own conduct, and <u>not</u> of any excessive exercise of the

zoning powers, there was no legal basis to authorize inverse condemnation. This determination was correctly affirmed by the Superior Court, Appellate Division, which determination was upheld by the action of the New Jersey Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that respondent's within Motion to Dismiss should be granted.

Respectfully submitted,

WURTZEL & POLLER

By /s/ Kenneth G. Poller
KENNETH G. POLLER

(3)

87 No. 1298

Supreme Court, U.S.
FILED
MAR 23 1988
JOSEPH F. SPANIOL, CLERK

In The

Supreme Court of the United States

October Term, 1987

WALTER J. BEPPLER,

Appellant,

vs.

TOWNSHIP OF WASHINGTON and
TOWNSHIP OF WASHINGTON PLANNING BOARD,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS IN RESPONSE TO THE JURISDICTIONAL STATEMENT

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MOTION TO DISMISS

Appellee Township of Washington and Township of Washington Planning Board (sometimes collectively referred to as "Township of Washington") files the within Motion to Dismiss in response to the Jurisdictional Statement filed by Appellant Walter J. Beppler.

STATEMENT OF THE CASE

The case sub judice presents a factual situation in which a landowner subdivided a large tract of land into as many lots as was permitted under the applicable municipal zoning ordinance governing the size and frontage of lots in the subject zone. This action resulted in the creation of two undersized lots. The landowner applied for, and received, a variance for one of the lots from the municipal zoning board of adjustment, but never applied for a variance for the other undersized lot. In such posture, the municipal planning board approved the landowner's subdivision which expressly reflected the undersized lot herein under consideration as being excepted from the planning board's subdivision approval. Thus, the subject lot remained undevelopable as a direct result of the actions of the landowner in effecting a self-created hardship. The refusal of the Township of Washington to permit development on this self-created undersized lot brings to bear the application of established principles of law concerning undersized lots in a municipal zoning context.

Appellant, in his Jurisdicational Statement, seeks to invoke this Court's jurisdiction with respect to the case at bar utilizing the provision of the Fifth Amendment of the U.S. Constitution which prohibits the governmental taking of private property without just compensation. However, there was no governmental taking by

the Township of Washington since the zoning ordinance predated the Appellant's subdividing of his large tract of land into smaller lots for development purposes. The "taking" was by the Appellant himself since he chose to create a lot which was not a permissibly developable property in the applicable zone. The salient facts underlying the issues presented in the case at bar follows.

Walter Beppler, Appellant in this action, purchased the subject property, Lot 5H, Block 4102A, as part of a larger tract in July 1946. Lot 5H bears a frontage of 52.94 feet. The rear boundary of the property is only 23.27 feet in length. The sides are 95.03 feet and 93.59 feet respectively.

Bulk requirements had been established in the Township of Washington, State of New Jersey in 1941 by ordinance. The property in question was situated in a Class A Zone, where both the frontage and width requirements were 100 feet. The ordinance was and remained in force when Appellant both purchased and subdivided his property.

In 1947 the Appellant submitted for the Planning Board's approval a subdivision map reflecting several lots with the required 100 feet frontage. It included a newly created lot with a frontage of 85.15 feet, an undersized lot under the 1941 zoning ordinance. Another newly created lot having frontage of 52.94 feet was also reflected on the map. This lot, designated lot 5H on the subdivision map, is the subject of the case at bar.

On the subdivision map, the word "excepted" appears on the subject parcel. All of the other lots appearing on the subdivision map which were not part of the subdivision development submitted by the Appellant to the Township of Washington

Planning Board in 1947 bore the same notation. Thus, the Planning Board did not consider or pass upon any of these lots so noted, including the lot in question.

Conversely, the Planning Board did consider the undersized lot bearing frontage of 85.15 feet. However, the Planning Board did not have authority in 1947 to grant a variance to that undersized lot for development; rather, such authority rested exclusively within the province of a different municipal agency; namely, the Township of Washington Board of Adjustment.

Recognizing that the Planning Board had no authority to grant a variance for the development of an undersized lot, the Appellant requested the Board of Adjustment to grant a variance for the lot having frontage of the 85.15 feet. The application was made by letter dated April 13, 1947. At the January 1985 hearing before the current Planning Board, the letter application was marked as an exhibit. The letter indicated that the Planning Board in 1947 initially rejected the subdivision because the 85.15 lot did not have the required frontage for the zone. The subdivision map reflects that the Board of Adjustment granted approval for development of the 85.15 lot at its regular meeting held on April 24, 1947. Thereafter, the Planning Board approved the subdivision at its meeting of May 12, 1947.

At no time was approval given for the development of the lot having frontage of 52.94 feet (lot 5H), the lot which is the subject of the present appeal. It continued to bear the notation "excepted." It was never the subject of an application before the Board of Adjustment for a variance. The Planning Board never approved development of lot 5H, nor did it have the legal authority to do so.

Prior to the appellant's application before the current Planning Board, the Appellant had applied to the Zoning Board of Adjustment for a variance in 1982 for the lot with the 52.94 foot frontage, lot 5H. The denial of the variance was primarily based upon the doctrine of self-created hardship. Thereafter, Appellant filed suit in the Superior Court of New Jersey, Law Division, based upon the Zoning Board's denial.

During the pendency of that suit, Washington Township enacted an ordinance which addressed the development of undersized lots as a conditional use authorized by N.J.S. 40:55D-67. The ordinance provides a bifurcated procedure with reference to any application for development as a conditional use. The first phase involves an inquiry by the Planning Board as to whether or not the subject lot is eligible for development. The basic criteria for eligibility mirror the current state of the law in the State of New Jersey regarding permissible developments of undersized lots. The ordinance retained the long established and well recognized "self-created hardship" doctrine which appears in the case law of the State of New Jersey.

The ordinance provides that no lot shall be eligible for development under the ordinance unless all of the requirements set forth in the ordinance are satisfied. They include the following:

> The lot was in existence as a separate lot at the time of enactment of the earliest land use restriction which rendered the lot non-conforming.
>
> At the time of adoption of the earliest land use restriction rendering the lot nonconforming, and at all times subsequent

thereto, no legal or equitable owner of the lot has simultaneously held legal or equitable title to any contiguous land.

Neither the owner of the lot nor any of said owner's predecessors in title created the non-conforming condition of the lot or caused self-inflicted hardship on the lot however evidenced.

The current Planning Board determined that the Appellant was the owner of adjoining lots to the subject lot at the time of the first adoption of the zoning ordinance pertaining to the subject premises; that at the time of the adoption of the earliest land use restriction rendering the lot non-conforming, the Appellant was the legal owner of contiguous land; and that the Appellant by his own subdivision created the subject lot and created the non-conforming condition of said lot. Thus, the Planning Board determined that the subject lot was not an eligible lot for development under the ordinance.

Thereafter, Appellant appealed to the Superior Court, Law Division, which upheld the decision of the municipal planning board, entered judgment in defendants' favor. The Superior Court, Appellate Division, affirmed the Superior Court, Law Division's determination per curiam.

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AS TO REFUSAL BY THE TOWNSHIP OF WASHINGTON TO PERMIT DEVELOPMENT OF THE SELF-CREATED UNDERSIZED LOT

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The Trial Court properly concluded that the crucial issue pertained to the interpretation of the

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Fourth, since the application in 1947 was brought before the Planning Board by the Appellant, there is no rational explanation for variances to have been granted to lots not owned by the Appellant. For example, reference is made to lot 3 which was owned by one Otto Shultz, and lot 4 which was owned by one F. Leyer. The Trial Court made specific mention of this fact.

Finally, the Trial Court properly found that, in 1947, the Planning Board did not have the legal authority to grant such variances. Rather, that power rested solely with the Board of Adjustment. See, Loechner v. Campoli, 49 N.J. 504, 512, 231 A 2d 553 (1967), and the subsequent change in the Municipal Land Use Law. Appellant's letter dated April 13, 1947 to the Board of Adjustment specifically supports this position. The letter noted that the Planning Board had rejected the subdivision because "one lot did not have the required 100 foot frontage." The specific lot referred to in that letter, lot 4B, had "frontage of eighty five and fifteen one hundreds feet." The plaintiff requested action by the Board of Adjustment at its April 24th meeting. Action was taken by the Board of Adjustment with respect to the 85.15 foot frontage lot, the "short lot", as evidenced by its approval noted on the subdivision map. However, there was no application with respect to the 52.94 foot frontage lot, lot 5H, the lot herein under consideration.

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AS TO REFUSAL BY THE TOWNSHIP OF WASHINGTON AND THE STATE COURT TO PERMIT INVERSE CONDEMNATION

Inverse condemnation is available where the value of property has been diminished by an excessive exercise of municipal zoning authority. Since the hardship in the present case was not the result of municipal action but was self-inflicted, there exists no basis to order the municipality to compensate Appellant for the "taking" of his property. Barnes, supra at 304.

Mere inutility is insufficient to establish a cause of action for inverse condemnation. Instead the owner's inability to use his property must be directly attributable to the unreasonable or excessive exercise of governmental authority. The facts in this case belie such a conclusion. The Planning Board concluded that Appellant did not come within the ambit of the undersized lot conditional use ordinance, because the

nonconformity was not caused by the municipality. Indeed, Appellant created his own hardship when he subdivided the tract in 1947, thereby creating the leftover parcel, lot 5H. Consequently, the Trial Court correctly interpreted the 1947 subdivision map in the same manner as the Planning Board had.

In support of his conclusion, the Trial Court noted the following facts. The lot was "grossly undersized." Situated in Class A zone, requiring frontage of 100 feet and a total area of 10,000 square feet, lot 5H bears frontage of 50 feet. At the rear, the property is only 23.27 feet wide. Contrary to opposing counsel's conclusion, construction of a dwelling upon the subject lot would both impair the intent of the zoning ordinance and diminish the quality of the residential area.

As noted previously, an examination of the subdivision map in light of the surrounding facts and circumstances, compels the conclusion that no variance was granted for lot 5H by means of the word "excepted." At the time of the subdivision in 1947, Mr. Beppler owned lot 5H as well as adjoining property. As the Trial Court noted, Appellant could have added the additional 50 feet to the adjoining lot, lot 5G, and perhaps he could have commanded a greater purchase price.

According to the Trial Court, the simple fact is that Mr. Beppler "got as many lots out of it as he could, and he had a piece left over that he decided to keep for himself. That's the only interpretation that can be given." It bears emphasis that Appellant made no effort to build upon lot 5H, the subject of this appeal, until approximately 20 years later. The record amply supports the fact that the hardship was self-created. Since the inutility of Appellant's property is directly attributable to his own conduct, and <u>not</u> of any excessive exercise of the

zoning powers, there was no legal basis to authorize inverse condemnation. This determination was correctly affirmed by the Superior Court, Appellate Division, which determination was upheld by the action of the New Jersey Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that respondent's within Motion to Dismiss should be granted.

Respectfully submitted,

WURTZEL & POLLER

By /s/ Kenneth G. Poller
KENNETH G. POLLER